1967

Bettilyon Construction Company v. State Road Commission Of Utah : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTILYON CONSTRUCTION COMPANY, a corporation,
Plaintiff-Appellant,

-v-

STATE ROAD COMMISSION OF UTAH,
Defendant-Respondent.

Case No. 10897

BRIEF OF RESPONDENT

Appeal from an Order of Dismissal of the District Court for Salt Lake County, Honorable D. Frank Wilkins, Judge

PHIL L. HANSEN
Attorney General
GARY A. FRANK
Assistant Attorney General
State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

F. BURTON HOWARD
KIRTON & BETTILYON
Attorneys at Law
336 South 300 East
Salt Lake City, Utah
Attorneys for Appellant

PRINTED BY SALT LAKE TIMES

TABLE OF CONTENTS

Cases Cited

TEXTS CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

BETTILYON CONSTRUCTION COMPANY, a corporation,
Plaintiff-Appellant,
-v-
STATE ROAD COMMISSION OF UTAH,
Defendant-Respondent.

Case No. 10897

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

Appellant brought suit against respondent, State Road Commission of Utah, wherein appellant sought to recover legal expenses incurred by appellant during the defense of a lawsuit insituted by a third party while appellant was performing a construction contract executed between appellant and respondent.

DISPOSITION IN THE LOWER COURT

Respondent filed a motion to dismiss appellant's complaint on the grounds that: (1) Appellant's complaint failed to state a claim on which relief could be granted, and (2) the court lacked jurisdiction over respondent on the grounds and for the reasons that respondent was immune from appellant's suit.

On or about the 16th day of March, 1967, respondent's motion to dismiss was heard by the Honorable D. Frank Wilkins, of the district court of Salt Lake County, State of Utah. Respondent's motion to dismiss was granted.

RELIEF SOUGHT ON APPEAL

Respondent submits that the granting of respondent's motion to dismiss should be affirmed.

STATEMENT OF FACTS

Respondent agrees with appellant's position that, for the purposes of a motion to dismiss, the facts as alleged by appellant must be taken as true.

A brief summary of the facts is as follows: After the execution of a highway construction contract, known and identified as Project No. I-IG-15-7(34), Second Contract, and Project No. I-15-6(46)306, Second Contract, by and between appellant and respondent, and during the performance of the contract by appellant, a complaint

was filed in the district court of Salt Lake County, State of Utah, by the Eimco Corporation wherein the Eimco Corporation sought to restrain and enjoin the completion of the project by alleging that the public enjoyed only a highway easement along Sixth South Street, Salt Lake City, Utah, and that the construction of an elevated highway would burden the easement by and through the construction of piers, pillars, and other obstructive appendages. This burdening of the easement allegedly necessitated the payment of compensation to the Eimco Corporation. The complaint also alleged an interference with light and air easements.

At the hearing of respondent's motion to dismiss, it was agreed by the parties that the suit of the Eimco Corporation was dismissed.

It is the legal expense incurred by appellant in the defense of the Eimco Corporation suit that is the subject of the present claim by appellant against respondent.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS APPELLANT'S COMPLAINT.

A principle firmly established by the decisions of this court is that the State of Utah and the Utah State Road Commission, as an agency of the State of Utah, may not be sued without the express written permission

of the State of Utah. *Wilkinson v. State of Utah,* 48 Utah 483, 134 Pac. 626 (1913); *Springville Banking Co. v. Burton,* 10 Utah 2nd 100, 349 P.2d 157 (1960); *Fairclough v. State Road Commission,* 10 Utah 2nd 417, 354 P.2d 104 (1960); *State v. Parker,* 13 Utah 2nd 65, 368 P.2d 585 (1962).

Appellant does not assail this basic principle, but attempts to bring the facts of the instant case within the statutory exception of Utah Code Ann. § 27-12-9 (1967), which provides:

> By its name the commission may sue, and it may be sued only on written contracts made by it or under its authority.

It may parenthetically be noted that respondent takes no issue with appellant's generalizations concerning the binding and forceful effect of contracts duly executed by respondent or under the authority of respondent, and if respondent breaches the contract, damages which are the natural consequence of the breach should be allowed.

However, the contracts executed by and between the parties in the instant case contain no express provision relating to the indemnification by the commission of costs of this nature incurred by the contractor in the performance of the contract. Appellant does not allege the existence of such an expressed provision and concedes that no such express provision exists. There being no express provision of this nature, respondent submits that appellant's action is not predicated on a written

contract executed by the respondent or under respondent's authority.

A provision for indemnification of legal expenses incurred in the performance of a contract is not a condition precedent to the performance of a contract. An example of a condition precedent to the performance of a contract which may be implied from the contract and enforceable, is the doctrine that in the absence of an express provision, a provision will be implied that a construction site will be made available to the contractor so that the contract may be performed. Therefore, respondent submits that a provision of indemnification is not the type of condition which may be implied against respondent and for which respondent may be held liable. *Derby Road Building Co. v. Commonwealth Dep't. of Highways,* 317 S.W.2d 891 (Ky. 1958); *George A. Moore & Associates, Inc. v. State Bd. of Conrol,* 240 Ore. 126, 400 P.2d 263 (1965).

Recognizing the absence of an express provision of indemnification in the subject contract and also the impossibility of implying such a provision, appellant attempts to bring the facts of the instant case within the written contract. The State of Utah Standard Specifications for Road and Bridge Construction, § 1-7.18 (1960), which are incorporated into and constitute a part of the contract between the parties, provides at 48:

> The director will be responsible for the securing of all necessary rights-of-way in advance of construction.

It is this contractual provision which appellant now alleges was breached by respondent. However, respondent submits that such an allegation fails to state a claim on which relief may be granted as a matter of law.

It is elementary that before a breach of contract may properly be said to have occurred, one of the parties to the contract must have committed either an overt act contrary to the terms of the contract or omitted to act as required by the contract. In the instant case, no such act or failure to act is alleged. Rather, the breach of contract which appellant seeks to attribute to respondent is the institution of a suit by an independent third party over whom respondent exercised no control or authority. Respondent submits that the mere allegations of a stranger to the contract may not be interpreted as a breach of the contract by one of the parties thereto.

The right of way furnished to appellant by respondent was sufficient and in compliance to the terms of the written contract. This is exemplified by the fact that, had not the third party action been instituted, there would have been no claim of insufficiency of the right of way. Also, both appellant and respondent agree that the third party suit by Eimco Corporation was dismissed and no judgment adverse to appellant or respondent rendered.

It is equally forecful to say that appellant could have reasonably foreseen the possibiliy of a third party suit of this nature as to impose such a duty on respondent. There was no guarantee or contractual warranty by

respondent that an unmeritorious third party suit of the nature instituted by the Eimco Corporation would not be brought during the course of construction.

Respondent, therefore, submits that the right of way furnished to appellant was sufficient and in compliance with the terms of the contract as a matter of law.

It may be noted that in each case cited by appellant, the breach of contract found to exist was an actual fact on the part of the defendant. For example, in *Madison County Constr. Co. v. State,* 177 Misc. 777, 31 N.Y.S.2d 883 (1941), the court sated at 31 N.Y.S.2d 885, 886:

> In the action [instituted by the third party], it was held that the location of the road, as fixed by the state authorities and upon which location claimant was working, included lands which were not owned by the state but by private parties. In effect it [result of the third party suit] meant that the state, in staking out the highway, had led the claimant to believe that it was working on land acquired by the state, which was not the fact.

In the instant case, the suit instituted by the Eimco Corporation was dismissed with no findings adverse to the appellant. There was also no finding that the right of way furnished by respondent was insufficient. Respondent again reiterates its position that the bare allegations of a third party are not sufficient to constitute a breach of contract on the part of respondent. Had the Eimco Corporation suit determined that the right of way transgressed a property right or interst of Eimco Corporation, respondent would concede to the allegations of appellant. However, such was not the case.

In support of the contention that the damages alleged by appellant may be recoverd from respondent, appellant cites *Cooper v. Weissblatt,* 154 Misc. 522, 277 N.Y.S. 709 (1935). In that case, however, the court recognized the necessity of two elements that must exist before a plaintiff may recover from a defendant costs incurred by the plaintiff in a prior suit that resulted from the actions of the defendant. These prerequisites were: (1) a breach of contract by the defendant, and (2) a judgment in the prior suit against the plaintiff. It is obvious that in the instant case, neither required element is present. Respondent submits that there was not a breach of the terms of the written contract by the respondent as a matter of law, and also, as a matter of fact, no judgment was obtained against the appellant by the Eimco Corporation in the prior suit.

The theory of *Cooper v. Weissblatt,* supra, presents an additional problem in that the doctrine of soverign immunity is waived only in suits predicated on written contracts executed by respondent or under the authority of respondent. It is extremely questionable whether the doctrine announced in *Cooper v. Weissblatt, supra,* even if the two require elements were present in the instant case, would be controlling.

It must also be noted that appellant's citation to 25 C.J.S. *Damages* § 50(e), at 787 (1966), applies only where there is an overt "unlawful act" on the part of the defendant. Also, in *Wunderlich v. State Highway Comm'n.,* 183 Miss. 428, 184 So. 456 (1938), the court considered a factual situation whereby the defendant did

not furnish the necessary right of way to the contractor until 105 days of the 200 day working time had expired.

It is obviously significant that the authorities cited by appellant deal with specific acts or omissions on the part of the governmental agency, and not, as the facts in the instant case establish, situations whereby the question as to the sufficiency of the right of way arises by virtue of a suit initiated by an independent third party who is a stranger to the contract.

CONCLUSION

The granting of respondent's motion to dismiss by the lower court was in accordance with established legal principles and good common sense. The doctrine of sovereign immunity would preclude appellant's suit as not being predicated on a written contract executd by the respondent or under respondent's authority. The allegation that respondent breached the contract in failing to supply appellant with good and sufficient right of way assumes the illogical foundation that the acts of an independent third party and stranger to th contract may be imputed and considered a breach of the contract by one of the actual contracting parties. Such a foundation is obviously without legal support.

Respectfully submitted,

PHIL L. HANSEN
Attorney General
GARY A. FRANK
Assistant Attorney General
Attorneys for Respondent